87-1576

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

KAMLESHWAR UPADHYA,

Petitioner,

v.

DONALD N. LANGENBERG, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Is a "mutually explicit understanding" constituting a protectible property interest created when a prospective government employee reasonably relies on a pre-hiring promise of a term of employment made with, at least, apparent authority, even when the promise is inconsistent with the governmental entity's administrative regulations (of which the employee was not apprised or aware)?

2. Did the Seventh Circuit err in holding that a promise to Petitioner of a term of employment was made without authority?

3. Did the Seventh Circuit violate *Anderson v. City of Bessemer*, 470 U.S. 564 (1985) in ruling that the District Court was "clearly erroneous" when it found that a term of employment had been promised to Petitioner?

4. Did the Seventh Circuit err in failing to uphold the District Court's ruling that Petitioner acquired a protectible property interest as a result of an "institutional common law" within his University department?

PARTIES TO THE PROCEEDINGS BELOW

Respondents are:

Donald N. Langenberg
Donald K. Coe
Chien-Heng Wu
Paul M. Chung
Robert H. Bryant
Steven Danyluk
Michael J. McNallan
Thomas C. Ting
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Kamleshwar Upadhya, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this action on November 25, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 834 F.2d 661, and is reprinted in the appendix hereto. (A. 1-10) The Seventh Circuit's order denying the Petition for Rehearing is reported at 834 F.2d 667 and is reprinted in the appendix

hereto. (A. 11-13) The Order and Memorandum of Opinion of the United States District Court for the Northern District of Illinois is reported at 671 F.Supp. 521, and is reprinted in the appendix hereto. (A. 14-31) The District Court's Findings and Conclusions have not been reported and are reprinted in the appendix hereto. (A. 32-44)

JURISDICTION

Petitioner filed this action in the Circuit Court of Cook County, Illinois with one count based on 42 U.S.C. § 1983. Respondents removed the action to the United States District Court for the Northern District of Illinois pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), 1441(a) and 1446. After a non-jury trial, a final judgment was entered in Petitioner's favor on August 31, 1987. Respondents appealed the judgment in favor of Petitioner to the Seventh Circuit which reversed the judgment on November 25, 1987 and denied the Petition for Rehearing on December 18, 1987.

The jurisdiction of this Court to review the decision of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

STATEMENT OF THE CASE

In the spring of 1984, Petitioner Dr. Kamleshwar Upadhya, a research fellow at the University of Minnesota, responded to an advertisement announcing an opening in the Department of Civil Engineering, Mechanics and Metallurgy ("CEMM") at the University of Illinois at Chicago ("the University"). (A. 33) As a result, Respondents invited him to Chicago for a series of interviews for the position. He went to dinner with several faculty members, interviewed with several other faculty members, and gave a seminar.

Dr. Upadhya sought a teaching/research position which would eventually lead to tenure at the University. (A. 32) He was qualified for either an associate professorship or an assistant professorship. He asked Respondent Dr. Wu, the CEMM Department Head, and Respondents Drs. McNallan and Danyluk, tenured members of the CEMM faculty, to explain the difference between the associate and assistant positions and for their advice as to which position he should pursue. They told Dr. Upadhya that the associate position carried a higher salary but would require a review for tenure after only two years, while the assistant professorship, although carrying a lower salary, would provide a five year period before he would be reviewed for tenure. (A. 34) Dr. Wu specifically told him that he would "get five years" as an assistant professor. (A. 12)

All three advised him that it would be in his best interest to pursue the five year assistant professorship despite its lower salary. They explained that a candidate's success in obtaining research grants was the prime deter-

mining factor in CEMM tenure decisions. They advised that, as an experimentalist, he would need the longer five year period to establish a record of obtaining the research grants justifying tenure. Based on that advice, Dr. Upadhya decided on the lower ranked assistant professorship. (A. 34-35)

A few weeks later, Dr. Upadhya telephoned from Minnesota to inquire whether an offer would be made, advising that he had other offers pending. In July, 1984, Dr. Wu offered him the position and told him that after certain forms were prepared, he would send a letter setting forth all the terms of Dr. Upadhya's employment in "black and white." (A. 35)

On July 30, 1984, Dr. Wu delivered the promised "black and white" letter (A. 36) which stated, in part:

> On behalf of the Department and with the concurrence of the Dean, I am happy to be able to offer you a tenure-track assistant professorship with an initial salary of $35,000 for the nine month academic year. A summer appointment of two-ninths of your academic salary, which requires you to teach one course during the eight-week summer quarter, is guaranteed for the first summer.
>
> A tenure code of A-2 must be assigned to your appointment to recognize your previous experience. This means that a recommendation for promotion or termination must be submitted by the Department no later than the beginning of your fifth year of service on campus. For a favorable recommendation, however, it will be necessary for you to demonstrate your ability to conduct independent research and to attract outside sponsorship.
>
> . . .
>
> I hope very much that you will find our offer acceptable. You may indicate that fact by signing the en-

> closed copy of this letter and returning it to me as soon as possible so that we may proceed to resolve the other formalities.

Relying on Respondents' advice, and the mutual understanding that he had a right to expect five years of employment before being reviewed for tenure (A. 36), Dr. Upadhya immediately signed and returned the letter to Dr. Wu. Two days later he delivered a course outline for the course he was to teach that September. He then resigned his position at the University of Minnesota, turned down the other outstanding offers, and relocated his family residence to Chicago. (A. 37-38)

On September 4, 1984, Dr. Upadhya appeared for work at the University, was given an office and assigned a course to teach. Later, he received a printed "Notification of Appointment" form (A. 38) from the University informing him that he had been appointed as an assistant professor:

> subject to all applicable laws and to the University of Illinois Statutes, the General Rules Concerning University Organization and Procedure, and other actions of the Board of Trustees.[1]

On October 1, Dr. Upadhya received his first month's paycheck and partial reimbursement for his moving expenses. Not until October 18, 1984 did the Board of Trustees of the University meet and approve Dr. Upadhya's appointment in a routine fashion. (A. 19, 39)

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[1] The Notification also drew Dr. Upadhya's attention to added typed words asking him to sign and return an attached copy in order to avoid "delay in payment of salary," which he did immediately. The District Court found that Dr. Upadhya reasonably believed the Notification to be "nothing more than part of the necessary paperwork required to get his name on the payroll. . ." (A. 38)

At the end of Dr. Upadhya's second academic year at the University, in late May, 1986, Respondents fired him and, for the first time, told him that his appointment at the University was actually for only one year at a time and was simply not being renewed. (A. 39) Earlier in May, Dr. Wu had met privately with the CEMM Advisory Committee and made a number of serious career-threatening charges against Dr. Upadhya. Subsequently, Dr. Wu included those charges in a "Recommendation for Non-retention" form which was submitted to Respondent Chung, Dean of the College of Engineering, and then to the University's Vice Chancellor, and finally, the Chancellor, Respondent Langenberg. Dr. Upadhya was never advised of these charges nor given any hearing or any other opportunity to rebut them. (A. 41-42)

In December, 1986, Dr. Upadhya filed this action in the Circuit Court of Cook County. One count of his complaint, brought under 42 U.S.C. § 1983, charged that he was entitled to a five-year term of employment which constituted "property" of which he had been deprived without due process in violation of the Fourteenth Amendment. Dr. Upadhya also asserted several causes of action under state law.

Respondents removed the action to the United States District Court for the Northern District of Illinois pursuant to 28 U.S.C. § 1441(a).[2]

The District Court's Ruling

After a thirteen day non-jury trial, the District Court ruled in Dr. Upadhya's favor, holding that the prehiring

[2] Subsequent to the removal, Dr. Upadhya voluntarily dismissed the state law claims in accordance with *Pennhurst State School & Hospital v. Holderman*, 456 U.S. 89 (1986).

representations made by Drs. Wu, McNallan, and Danyluk, together with the July 30, 1984 letter, constituted, at a minimum, an implied contract for a five-year term of employment. (A. 22, 43) The Court ruled that the five-year term was a protectible property interest entitling Dr. Upadhya to the protections of the Fourteenth Amendment's Due Process clause before being fired.

The District Court rejected Respondents' defense that the University's bylaws (known as the University Statutes), which state that ". . . an appointment as assistant professor shall be for not more than two years,"[3] negated an implied contract for five years in this instance.

The District Court rejected this defense for several reasons. First, the Court made a finding of fact that Dr. Upadhya's employment contract was created upon the execution of the July 30 letter agreement, finding that after that date, both Dr. Upadhya and Respondents behaved as though they had entered into a binding agreement. (A. 37)

Second, the Court found that Respondents had never told Dr. Upadhya that his appointment would be for one year at a time or that he could be terminated at the end of any one year for no reason. They never disclosed to him the existence of the University Statutes until long after he had accepted the University position, turned down other offers, moved to Chicago and begun work. Even then, no one ever actually gave him the Statutes

[3] University Statutes, Art. X, § 1(a)(2). Other sections of the University Statutes relied on by Respondents provided that untenured professors could be terminated at the end of any given year (Art. X, § 1(b)(4)) and that an appointment for one year carried no guaranty of a renewal of the appointment. (Art. X, § 1(b)(6)).

or directed his attention to the provisions relied upon by the University at trial. (A. 39) Further, the Court found, as fact, that the intent of both Dr. Wu and Dr. Upadhya, embodied in the July 30 letter agreement, was that Dr. Upadhya would have a five-year term before being reviewed for tenure and that Respondents "did *not* intend" Dr. Upadhya to be employed one year at a time. (emphasis in original) (A. 36)

Based on the testimony of Chancellor Langenberg, Vice-Chancellor Stukel, and Dean Chung, establishing that department heads have authority to offer positions to prospective faculty and, specifically, that Dr. Wu had authority to send the July 30, 1984 letter to Dr. Upadhya, (A. 37, 42) and that department heads have sole discretion as to whether to initiate non-retention at the end of each year (A. 40), the Court found that Dr. Wu had authority to reach the agreement with Dr. Upadhya for a five year term. (A. 42) The Court further held that Dr. Upadhya was reasonable in his reliance on this agreement. (A. 43)

Relying on *Vail v. Board of Education*, 706 F.2d 1435 (7th Cir. 1983), *aff'd by an equally divided court*, 466 U.S. 377 (1984), the Court issued an injunction requiring Respondents either to employ Dr. Upadhya for the full five year period or to afford him a hearing in conformance with due process before terminating him.

The District Court also found that the actual practice within CEMM was always to provide tenure-track professors with their entire tenure-track period before subjecting them to tenure review or termination. (A. 40) The Court held this practice to constitute an "institutional common law" creating a property interest in Dr. Upadhya for the completion of his five year tenure track. (A. 43)

The Seventh Circuit's Opinion

On appeal, the Seventh Circuit reversed, reasoning that because the bylaws provided assistant professors with, at most, two year appointments and not five year terms, Dr. Wu did not have authority to make the agreement he actually made with Dr. Upadhya on July 30. (A. 13) Even though Respondents had never disclosed the bylaws to Dr. Upadhya and Dr. Wu's lack of authority was therefore not ascertainable, the Court held that Dr. Upadhya should not have relied on Dr. Wu's five year promise. (A. 7)

The Seventh Circuit relied on two earlier cases holding that untenured professors at the University had no property interest in continued employment: *Weinstein v. University of Illinois*, 811 F.2d 1091 (7th Cir. 1987) and *McElearney v. University of Illinois*, 612 F.2d 285 (7th Cir. 1979). The Court ignored the fact that, unlike Dr. Upadhya, neither Weinstein nor McElearney had alleged a pre-hiring promise of a fixed term of employment upon which he had relied.

The Seventh Circuit also ruled that the District Court was "clearly erroneous" in finding that Dr. Wu had actually promised Dr. Upadhya a five year term, and held that Dr. Upadhya's expectation was not "mutual" but "unilateral." (A. 9)

REASONS FOR GRANTING THE WRIT

A. Property Interest.

In 1983, this Court issued a Writ of Certiorari to the Seventh Circuit in order to review *Vail v. Board of Education, supra*, 706 F.2d 1435 (7th Cir. 1983), *aff'd by an equally divided court*, 466 U.S. 377 (1984), on the question of whether a promise to a probationary teacher could create a property interest in continued employment in the face of a statutory tenure scheme to the contrary. 52 U.S.L.W. 3180-81.[4] Virtually the identical question is presented here.

Because *Vail* was ultimately affirmed without opinion by an equally divided court, there was no decision of precedential value. Thus, the need for clarification which warranted review in *Vail* remains.

Ever since *Perry v. Sindermann*, 408 U.S. 593 (1972) and *Board of Regents v. Roth*, 408 U.S. 564 (1972), much litigation has been generated as to whether particular employee relationships constitute the kind of "mutually explicit understanding" which amounts to a protectible property interest under *Perry*, 408 U.S. at 601.

At one end of the spectrum, it is well settled that a term of employment (or permanent employment such as

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[4] In *Vail*, the Seventh Circuit had ruled:

> . . . even if we were to assume *arguendo* that no *enforceable* contract under state law existed between Vail and the Board, we are not prepared to hold that this alone precludes the establishment of a protected property interest. (Emphasis in original)

706 F.2d at 1440.

university tenure) created by an express contract is a "property interest" for due process purposes. *See, e.g. Hostrop v. Board of Junior College District*, 471 F.2d 488 (7th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973).

By contrast, a great amount of conflict, confusion, and inconsistency has arisen in the various circuits over whether employment arrangements which fall short of enforceable contracts, or which conflict with or are inconsistent with statutes or administrative regulations, constitute protectible property interests under the "mutually explicit understanding" standard.

Since *Perry*, this Court has not expanded on or further defined that standard to clarify the rights of both governments and their employees. That is why *Vail* warranted this Court's attention and why *Vail* generated *amicus curiae* briefs from the American Association of University Professors, the National School Boards Association, and the National Education Association and American Civil Liberties Union. Further guidance from this Court is still necessary to eliminate, or at least reduce, the confusion surrounding this important issue.

In the instant case, the Seventh Circuit has moved well beyond any pronouncement of this Court by holding, in effect, that only an enforceable contract will suffice to create a protectible property interest. Citing footnote 21 in this Court's opinion in *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 788 (1980), the Seventh Circuit stated that, for an expectation of continued employment to be a property interest, it must be "legally enforceable." The Court then justified its ruling against Dr. Upadhya on the ground that his employment agreement with Dr. Wu was not enforceable because, under the University's bylaws, Dr. Wu could bind the University to no more than a two-year term.

The Seventh Circuit attempted to find further support for its holding in footnote 7 of the *Perry v. Sindermann* opinion, 408 U.S. at 602. However, in that footnote, Justice Stewart declined to limit the teacher's claims only to contract rights, saying that the teacher would have no right to due process if he had "no contractual or *other claim to job tenure . . .*" 408 U.S. at 602 (emphasis added).

Although *Perry* held that express and implied employment contracts do create protectible property interests, this Court declined to limit due process protections only to enforceable contracts. Justice Stewart carefully chose the term "mutually explicit understanding" and not a term such as "legally enforceable contract" for this very reason. Obviously, this Court anticipated that circumstances other than enforceable employment agreements could warrant due process protections.

Likewise, footnote 21 in *O'Bannon v. Town Court Nursing Center, supra,* 477 U.S. 773 (1980), relied on by the Seventh Circuit, does not have the limited meaning attributed to it by that Court. There, Justice Stevens also refused to limit due process protections only to "legally enforceable" rights. Instead, he observed that *Perry* applied such protections to:

> an expectancy of continued employment that was legally enforceable against [the employer]—*or at least could not be terminated by the employer without observing certain minimal safeguards.* (emphasis added)

447 U.S. at 788. Clearly, this Court continued to acknowledge the teaching of *Perry* that property interests "are not limited by a few rigid technical forms." 408 U.S. at 601.

In sum, the Seventh Circuit's efforts to limit the scope of due process protections to employees whose terms of

employment are set by a legally enforceable contract is unwarranted and runs counter to the broad dictates of this Court.[5]

Moreover, the Seventh Circuit's reasoning conflicts with the approach in other circuits, most directly the Sixth Circuit in *Soni v. Board of Trustees of the University of Tennessee*, 513 F.2d 347 (6th Cir. 1975), *cert. denied*, 426 U.S. 919, (1976). In *Soni*, a state statute flatly prohibited Professor Soni from being awarded tenure because he was not a U.S. citizen. Nevertheless, Soni's department head told him that he would be treated as though he had tenure. Later, when Soni challenged his subsequent firing without a hearing on due process grounds, the Sixth Circuit ruled that the promise from the department head created a protectible property interest even though only the Board of Trustees and not department heads could award tenure and even though the department head's promise of tenure was directly prohibited by state statute (*see* 376 F.Supp. 289, 291), 513 F.2d at 351. In addition, the Sixth Circuit expressly rejected an argument relied upon by the Seventh Circuit in this case when it held that a formal tenure system did not preclude a reasonable expectancy of continued employment but rather was "but one factor . . . to consider in analyzing the due process claim of a formally nontenured professor." 513 F.2d at 351. By contrast, the Seventh Circuit, here, ruled that Dr. Upadhya did not have a reasonable expectation of continued employment in the face of University bylaws which contradicted the pre-hiring representations made to him.

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[5] The reasoning also appears to retreat from the Seventh Circuit's own ruling in *Vail v. Board of Education*, *supra*.

Similarly, in *Harris v. Arizona Board of Regents*, 528 F.Supp. 987 (D. Ariz. 1981), only the Board of Regents had power to award tenure. Nevertheless, the Dean, by letter, offered the plaintiff "tenure automatically" after his second year if he accepted a position at the University. The District Court, relying on *Soni v. Board of Trustees, supra*, held that the letter created a protectible property interest based upon the Dean's "apparent authority." 528 F.Supp. at 997.

In numerous additional cases, courts have apparently considered this issue, not on the basis of whether the government official who promised employment had authority to do so, but rather on whether an employee's reliance on a "mutually explicit understanding" was reasonable in the face of conflicting or contradictory statutes or rules. For example, in *Lovelace v. Southeastern Massachusetts University*, 793 F.2d 419 (1st Cir. 1986), the First Circuit stated the rule that reasonable reliance on assurances of employment is precluded "when there is a written [formal] system *of which the employee is aware*, . . . 793 F.2d at 423 (emphasis added).

In *Wright v. Cayan*, 817 F.2d 999 (2d Cir. 1987), *cert. denied*, ____ U.S. ____ (1987), the Second Circuit held that an "at will" university employee could not rely on a letter from her superior received several months after she had accepted the job, 817 F.2d at 1004. *See also Baden v. Koch*, 638 F.2d 486 (2d Cir. 1980).

In *White v. Mississippi State Oil & Gas Board*, 650 F.2d 540, 543 (5th Cir. 1981), the Fifth Circuit observed that an "at will" employee could not rely on an oral promise of continued employment unenforceable under Mississippi's statute of frauds. *But see Christian v. McKaskle*, 649 F. Supp. 1475, 1480 (S.D. Tex. 1986), where the Court allowed

a prison warden to prove a "mutually explicit understanding" despite state statutes making him an employee "at will."

Some courts have held that a Federal employee can never have a property interest when a promise of employment conflicts with Federal law. For example, in *Bollow v. Federal Reserve Bank of San Francisco*, 650 F.2d 1093 (9th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982), the Ninth Circuit held that, regardless of the reasonableness of the reliance, an employee could not rely "on an assurance [his superior] was not authorized to make, even if the employee did not know about the statutory limits on the superior's authority." 650 F.2d at 1100. There, however, the assurance was made long after the employee had accepted the job. *Fiorentino v. United States*, 607 F.2d 963 (Ct.Cl. 1979), *cert. denied*, 444 U.S. 1083 (1980) followed the same approach but acknowledged the possibility of a different outcome if an unauthorized promise of job security were made on behalf of a state government as distinguished from the U.S. government, 607 F.2d at 968-69.[6]

By contrast, in *Orloff v. Cleland*, 708 F.2d 372, 377 (9th Cir. 1983), the Ninth Circuit held that a Veteran's Administration Hospital employee might be able to prove a "mutually explicit understanding" of continued employment even though his employment contract had expired and he was not covered by statutory Civil Service protections. Similarly, in *Sullivan v. Stark*, 808 F.2d 741 (10th Cir. 1987), the Tenth Circuit held that an "at will" Interior Department employee might still have a term of employment constituting a protectible property interest.

[6] It should be noted that Bollow and Fiorentino were government attorneys, a fact that made their claimed reliance less reasonable than that of other plaintiffs.

And in *Ashton v. Civiletti*, 613 F.2d 923, 928-29 (D.C. Cir. 1980), the District of Columbia Circuit held that a statutorily exempt FBI employee might have a protectible property interest as a result of ambiguous statements in the employee handbook which could have led him to assume that he had job security.

The foregoing cases are merely a sampling of many variations and inconsistencies that have resulted from the lower courts' grappling with the "mutually explicit understanding" standard of *Perry*. Obviously, some courts have followed the mandate of *Perry* that property interests are "not limited by a few rigid technical forms." Others, such as the Seventh Circuit in the instant case, have approached the issue narrowly, ignoring real world practicalities and the expansive inducements directed towards those considering government employment.

The effect of the narrow, technical approach embraced by the Seventh Circuit is to permit government employers to mislead and deceive their employees, as in the present case. Here, the University held Dr. Wu out to the world to have authority to negotiate and offer employment to prospective faculty members. Moreover, no one in the University ever disclosed to Dr. Upadhya the University rules which purportedly negated the promises made to him until long after he had acted on those promises by quitting his previous job, turning down other job offers, and relocating to Chicago. The purpose of due process is to protect against just this type of arbitrary government action.

Keeping in mind that Dr. Upadhya is not seeking to impose contract obligations on the University but rather seeks only due process protections, this Court should grant certiorari in this case in order to provide a more

definitive explanation of the type of "mutually explicit understanding" which will afford government employees protections against arbitrary behavior.

Elaborating on Justice Stewart's admonishment in *Roth* that the purpose of due process is to "protect those claims upon which people rely in their daily lives," 408 U.S. at 577, Justice Blackmun, in his concurring opinion in *O'Bannon v. Town Court Nursing Center*, *supra*, 447 U.S. 773 (1980), explained that the inquiry into whether a protectible property interest has been created "should be broad gauged:"

> Reason and shared perceptions should be consulted to define the scope of the claimant's 'justifiable' expectations. Nor should constitutional policy be ignored in deciding whether constitutional protections attach. This approach not only permits sensible application of due process protections; it reflects the unremarkable reality that reasonable legal rules themselves comport with reasonable expectations.

447 U.S. at 797.

Most importantly, Justice Blackmun, citing *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 9 (1978), reemphasized that:

> Whether protected entitlements exist and how far they extend, although dependent on subconstitutional rules, see, *e.g. Bishop v. Woods*, *supra*, are ultimately questions of constitutional law.

447 U.S. at 797. Thus, whether due process protections apply to a promise of employment, as distinguished from whether a state court might find an enforceable contract, is clearly a question of constitutional law to be decided under the Fourteenth Amendment.

This Court should grant certiorari in order to consider this important issue, overturn the erroneous approach of the Seventh Circuit, and eliminate the contradictions and inconsistencies among the circuits discussed above. Government employers and employees need a clearer definition of "mutually explicit understanding."

B. The Seventh Circuit Erred In Holding that Dr. Wu Lacked Authority Under the University Statutes.

The Seventh Circuit's holding that the University Statutes prohibited Dr. Wu from promising five years of employment is unsupported by the record. Other provisions of the Statutes (Art. IX, § 4d, Art. X, § 1a, and Art. XIII, § 7) (A. 3) show that the overall scheme clearly contemplated separately negotiated arrangements in particular situations like Dr. Upadhya's. Moreover, since Respondents concede that, under the Statutes, Dr. Wu had the sole discretion whether to initiate termination of any untenured professor at the end of each year, clearly Dr. Wu had the authority to agree not to use that power against Dr. Upadhya. The Seventh Circuit was wrong to overturn the District Court on this issue.

C. The Seventh Circuit Erred in Overturning "Findings of Fact."

If this Court grants certiorari, it should also consider whether the Seventh Circuit ignored the mandate of *Anderson v. City of Bessemer*, 470 U.S. 564 (1985). The District Court, after hearing thirteen days of trial testimony, including that of Dr. Upadhya, Dr. Wu, and others with whom Dr. Upadhya had engaged in prehiring discussions, found that Respondents had promised Dr. Upadhya an employment term of five years before a tenure decision would be made. The District Court specifically found

that Dr. Wu intended that Dr. Upadhya would have a right to serve for a full five year period, and based its holding on numerous and detailed findings of fact, none of which were challenged or undermined by the Seventh Circuit.

However, the Seventh Circuit, ignoring these findings, stated that when Dr. Wu told Dr. Upadhya he would "get five years," he did not say whether five years was a minimum or a maximum, and held that, as a result, no promise had been made. This artificial description of the negotiations between the parties swept aside the careful findings of the District Court in order to deprive Dr. Upadhya of a promise clearly made to him.

The Seventh Circuit clearly violated the mandate of *Anderson v. City of Bessemer*, *supra*, that:

> . . . the court of appeals may not reverse [the District Court] even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.

470 U.S. at 574.

D. The "Institutional Common Law" Supports Dr. Upadhya's Property Interest.

As a separate and distinct basis for holding that Dr. Upadhya had a protectible property interest, the District Court, relying on the principles of *Perry v. Sindermann*, *supra*, found that CEMM had an "institutional common law" which afforded Dr. Upadhya his complete five year tenure-track period before being terminated. The Seventh Circuit wholly failed to discuss this issue, but presumably reversed the District Court's finding on the "institutional common law" *sub silentio*. The District Court's finding on this issue was not only not "clearly erroneous" but

was fully supported by the evidence. Therefore, under *Anderson v. City of Bessemer, supra*, that finding should have been upheld.

CONCLUSION

In order to afford public employees throughout the various circuits uniform rights to due process as mandated by this Court in *Perry v. Sindermann*, this Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 87-2422 and 87-2555

KAMLESHWAR UPADHYA,

Plaintiff-Appellee,

v.

DONALD N. LANGENBERG, et al.,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 0086—**James B. Parsons,** *Judge.*

ARGUED NOVEMBER 5, 1987—DECIDED NOVEMBER 25, 1987

Before FLAUM, EASTERBROOK, and RIPPLE, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* The University of Illinois hired Kamleshwar Upadhya in 1984 as an assistant professor of engineering. He was appointed to the tenure track, with a decision to be made no later than fall 1988, the beginning of his fifth year. Upadhya believes that the University committed itself to give him the full five years to demonstrate his professional skills.

The University evaluates each professor on the tenure track annually, and after evaluating Upadhya in June 1986 the University decided not to renew his contract. As the Statutes of the University require, Upadhya received a

terminal appointment, expiring on August 31, 1987. He filed this suit under 42 U.S.C. §1983, contending that his discharge violated the Due Process Clause of the fourteenth amendment. The district court held a trial and issued a permanent injunction compelling the University to "continue [Upadhya] in his present position in this employ until it has given him constitutionally sufficient due process of law with relation to his termination".

The Due Process Clause of the fourteenth amendment applies only to deprivations of "life, liberty, or property". Upadhya maintains, and the district court held, that his job is "property". The district court apparently concluded that once the University hires a professor, it may not let the professor go without providing an adversarial hearing. This is the effect of the injunction, which does not distinguish between the initial five-year period and an indefinite (tenured) appointment. We have held, however, that professors on the tenure track at the University of Illinois lack a property interest in receiving tenure. *Weinstein v. University of Illinois*, 811 F.2d 1091, 1097-98 (7th Cir. 1987); *McElearney v. University of Illinois*, 612 F.2d 285 (7th Cir. 1979). To the extent the district court thought that an initial appointment carries with it the right to remain until dismissed after an adversarial hearing, its decision is inconsistent with settled law.

Upadhya, however, did not request the relief the district court afforded him. He wanted only an order confirming his right to remain at the University until August 1989—the end of the five-year period commencing with his appointment. He asserted a contractual entitlement to five full years on the basis of statements made during the negotiations leading to his appointment. The University, for its part, has relied on its Statutes—bylaws having the force of administrative rules and hence "law" in Illinois. *Rend Lake College Federation of Teachers v. Community College District*, 84 Ill. App. 3d 308, 311, 405 N.E.2d 364, 367-68 (5th Dist. 1980) (collecting cases). These Statutes provide that appointments to untenured positions run no longer than two years and limit extensions to those expressly approved by the President or Board of Trustees:

> The terms of employment for all members of the academic and administrative staffs shall be stated explicitly in the contract of employment. [Art. IX §4d.]
>
> Except under unusual circumstances evidenced by a special written agreement approved by the President of the University and the appointee, the tenure for the academic ranks of professor, associate professor, assistant professor, and instructor shall be as provided in this section. . . . During the probationary period . . . an appointment as assistant professor shall be for not more than two years . . . . [Art. X §1a and §1a(2).]
>
> The Board of Trustees . . . . expressly reserves to itself the power to act on its own initiative in all matters affecting the University, notwithstanding that such action may be in conflict . . . with the provisions of these *Statutes*. [Art. XIII §7.]

The portions of the Statutes limiting the terms of employment, we held in *McElearney* and *Weinstein*, prevent assistant professors from possessing a legitimate claim of entitlement (and hence a "property" interest) in renewal of their contracts. The University insists that the same limited duration of the initial contract of employment governs Upadhya, who therefore lacks any current "property" interest in employment at the University. Upadhya contends, and the district court found, that the professors who recruited him promised him five years to prove himself, and that this promise creates a property interest despite the Statutes and our holdings in *McElearney* and *Weinstein*.

We start with the writings, the essence of the contract. The first writing is a letter dated July 30, 1984, from Chien H. Wu, Head of the University's Department of Civil Engineering, Mechanics, and Metallurgy. The letter, written after the faculty of the Department had interviewed Upadhya and recommended his appointment, states (emphasis added):

> On behalf of the department and with the concurrence of the Dean, I am happy to be able to offer you a tenure-track assistant professorship with an initial salary of . . . for the nine-month academic year. A summer appointment of two-ninths of your academic salary, which requires you to teach one course during the eight-week summer quarter, is guaranteed for the first summer.
>
> A tenure code of A2 must be assigned to your appointment to recognize your previous experience. This means that a recommendation for promotion or termination must be submitted by the department *no later than the beginning of your fifth year* of service on Campus. For a favorable recommendation, however, it will be necessary for you to demonstrate your ability to conduct independent research and to attract outside sponsorship.
>
> . . . I hope very much that you will find our offer acceptable. You may indicate that fact by signing the enclosed copy of this letter and returning it to me as soon as possible so that we may proceed to resolve the other formalities.

The "other formalities" included securing the approval of the University's Board of Trustees.

Upadhya signed the copy of Wu's letter and moved to Chicago. He found waiting a "Notification of Appointment", dated August 29, 1984, stating in part:

> By authority of The Board of Trustees of the University of Illinois, you have been appointed to the following position(s) in the University: Assistant Professor of Metallurgical Engineering—Engineering, Civil, Mechanical and Metallurgy . . . Tenure Code 2 . . . Percent time 100 . . . Period of service Academic year 1984-85 . . . Period of payment from 09-01-84 through 08-31-85 . . . This appointment is made subject to all applicable laws and to the University of Illinois Statutes. . . . Please indicate your action (acceptance or

> declination of this appointment) on the attached copy and return it . . . . Delay in returning the acceptance may result in delay in payment of salary.

Upadhya promptly signed the attached copy and took up his duties. An administrator testified that a two-page extract of the Statutes pertinent to terms of employment is included with all such notifications. Upadhya testified that no extract came with his, that he did not obtain the Statutes from any other source despite the notification's warning that "[c]ertain terms of employment . . . appear . . . in the enclosed document", and that he was unacquainted with the Statutes' contents. The district court credited this testimony. Upadhya received a similar notification in September 1985 appointing him to service for "ACAD YEAR 1985-86" with a tenure code of 3; he testified, and the district court concluded, that he did not receive the extract of the Statutes with this notification either. Each notification included the advice: "When a number appears in the Tenure Code column it indicates the number of years which will be credited at the end of this appointment period toward the completion of the [seven-year] probationary period identified in Article X, Section 1 of the *University of Illinois Statutes*." Upadhya testified, and the district court found, that he did not read this advice.

These three documents (the Wu letter and the two notifications), when read in conjunction with the Statutes, show that the University was giving Upadhya a series of year-to-year contracts, with a limit of five before a tenure decision had to be made. Under *Board of Regents v. Roth*, 408 U.S. 564, 576-78 (1972), a professor serving on a series of annual appointments, without an entitlement to renewal founded on state law, has no property interest in his position.

Upadhya relies on the circumstances of his appointment to create a property interest. He was invited to Chicago to present a paper; he was asked to move from Minneapolis to Chicago to take up a new job; he was told that

he had to publish and secure outside funding, which would take time; surely, he says, these things require greater security than year-to-year appointments. Upadhya also relies on conversations preceding the July 30 letter. He discussed with Wu and other members of the department how long assistant professors had to prove themselves; they indicated that he would have five years. This is how Upadhya interpreted the tenure code 2: as a promise that he would have five years before the University would make an up-or-out decision. The district court found that such conversations took place and that Upadhya had an expectation that his term would be not less than five years.

If Upadhya had a contractual five-year term, then the Due Process Clause would require notice and an opportunity for a hearing if the University wished to dismiss Upadhya earlier. *Perry v. Sindermann*, 408 U.S. 593 (1972); *Vail v. Board of Education*, 706 F.2d 1435, 1440-41 (7th Cir. 1983), affirmed by an equally divided Court, 466 U.S. 377 (1984). So we must decide whether the oral statements and Upadhya's expectations created a term of his employment. This case is governed by the caution in *Roth*, 408 U.S. 577, that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract desire or need for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." A "legitimate claim of entitlement" means more than a high probability of renewal. *Roth*, 408 U.S. at 578 n.16; cf. *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 463-65 (1981). It means an "expectation . . . that was legally enforceable", *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 788 n.21 (1980), a mutually binding obligation, *Jago v. Van Curen*, 454 U.S. 14, 18-20 (1981). See also, e.g., *Scott v. Village of Kewaskum*, 786 F.2d 338 (7th Cir. 1986); *Reed v. Village of Shorewood*, 704 F.2d 943, 948-49 (7th Cir. 1983). As the Court said in *Perry* about a claim to employment based on promises and customs of the employer: "If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure,

the respondent's claim would be defeated." 408 U.S. at 602 n.7. See also *Bishop v. Wood*, 426 U.S. 341, 344-47 (1976).

Upadhya's claim is based on his understanding of what was said to him, rather than on the words the University used or a reading of its Statutes. The three writings do not promise him five years' employment; the Statutes make it clear that no one with whom Upadhya dealt had the authority to make such a promise. Giving a paper, moving from one city to another, and similar activities are common among assistant professors and do not negate the Statutes. Neither do vague statements about how long Upadhya could expect to serve before a final decision. Such statements—no doubt accurate depictions of the practices—do not transmute probabilities into entitlements. We held as much in *McElearney*, 612 F.2d at 291. A misunderstanding of one's entitlements, even if reasonable, does not enlarge those entitlements. *Smith v. Board of Education*, 708 F.2d 258, 264 (7th Cir. 1983).

We accept the district court's finding that Upadhya believed that his appointment ran for five years and that no one expressly told him otherwise. The court also found that Upadhya did not receive or read the Statutes that would have disabused him—though Upadhya signed a document expressly incorporating these readily-available Statutes, making them part of the contract under Illinois law. E.g., *Golen v. Chamberlain Manufacturing Corp.*, 139 Ill. App. 3d 53, 59, 487 N.E.2d 121, 126 (1st Dist. 1985). Upadhya's belief is still just a "unilateral expectation." It cannot be a "legitimate claim of entitlement" unless backed up by a promise. *Ladesic v. Servomation Corp.*, 140 Ill. App. 3d 489, 491, 488 N.E.2d 1355, 1356 (1st Dist. 1986). (Given the parol evidence rule, Upadhya would face hurdles in relying on even an express oral promise, for he uses it to vary the terms of three subsequent writings; more, Illinois treats the Statutes as "laws," which may forbid variances by subordinate officials of the state. We need not consider whether Upadhya has adequate replies to these difficulties.)

in order to obtain money before they consider me for tenure." (A. 8).

The second (and final) passage of record testimony relied on by Upadhya is Upadhya's testimony describing his discussion with Department Head Wu during his initial visit to the University. (A. 10). The full passage[3] of Upadhya's testimony is:

> Q. All right. Was there any further discussion that you had with Dr. Wu during this meeting that you can recall?
>
> A. The second I think then he told, "Well, for assistant professor, you get five years to bring research money." Or—no. He told, "Before we consider you for tenure and for associate professor, we will consider you after two years."

(A. 11). As the Seventh Circuit noted, this second passage does not support Upadhya's claim because Upadhya took back the five year figure and substituted a two year period. (A. 12-13).

The Seventh Circuit concluded that neither of these passages is sufficient to support an enforceable claim to continued employment for five years. Neither statement distinguished between the maximum or outside limit for Upadhya to make a case for tenure, and the minimum years of employment guaranteed. (A. 8, 13). As the Seventh Circuit noted, being allowed more time is not the same thing as being guaranteed more time. (A. 8-9). Further, when Wu made Upadhya a written offer by letter on July 30

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[3] The Seventh Circuit noted that the full passage of Upadhya's testimony is rather different from the extract which Upadhya's counsel quoted—"You get five years." (A. 11). Upadhya's counsel continues to misquote the shorter version of this testimony out of context herein. (Upadhya's Petition for Certiorari at p. 19).

(not to mention the terms of Upadhya's appointments from the Board of Trustees and the provisions of the *Statutes*), Wu identified five years as an outer limit for Upadhya to make a case for tenure, *not* as a period of guaranteed employment. (A. 9).

Moreover, the Seventh Circuit noted that neither McNallan, Danyluk nor Wu was authorized to bind the University to a five year employment commitment. (A. 9, 13). McNallan and Danyluk had no authority to bind the University to any employment commitment. (A. 9). While Wu had actual authority to make an offer of employment, he did not have the authority to make an extended offer contrary to the *Statutes'* two year limitation on assistant professor appointments. (A. 13). Under the *Statutes*, only the President of the University and its Board of Trustees had such authority. (A. 13).

The Seventh Circuit also noted that, given the parol evidence rule, Upadhya would face hurdles in relying on even an express oral promise of employment for five years because he would be using it to vary the terms of three subsequent writings. Moreover, the Seventh Circuit noted that Illinois treats the *Statutes* as laws, which may forbid variances by subordinate officials of the state. (A. 7). Because the record did not support the district court's finding that Upadhya was promised employment for five years, the Seventh Circuit found it unnecessary to consider whether Upadhya had adequate replies to these difficulties. (A. 7-8).

The Seventh Circuit also considered the circumstances surrounding Upadhya's appointment and his beliefs and understandings of his appointment. (A. 5-6). The Seventh Circuit concluded that giving a paper, moving from one city to another, and similar activities are common among

assistant professors and do not negate the *Statutes*. (A. 7). Vague and informal statements about how long Upadhya could expect to serve before a final tenure decision was required do not translate probabilities into entitlements. (A. 7). The Seventh Circuit acknowledged that Upadhya interpreted the tenure code of 2 assigned to his initial appointment to mean that he would have five years before the University would make an up-or-out decision (A. 6), and accepted the district court's finding that Upadhya believed his appointment ran for five years and no one expressly told him otherwise. (A. 7). The Seventh Circuit also accepted the district court's finding that Upadhya did not receive or read the *Statutes* that would have disabused him of his misunderstanding, while noting that Upadhya signed his appointment which expressly incorporated the readily available *Statutes*, making them part of his contract as a matter of Illinois law. (A. 7).

The Seventh Circuit concluded that Upadhya's belief was a "unilateral expectation," not a legitimate claim of entitlement to continued employment under Illinois law, because his belief was not backed up by a promise. (A. 7, 9-10). Upadhya did not obtain an express promise that five years would be his minimum term of employment. (A. 10). Any implication to that effect was unauthorized by the President and the Board of Trustees of the University—the only persons who could bind the University to such contracts. (A. 10). Accordingly, the Seventh Circuit reversed the district court and held that Upadhya lacked a property interest in further renewal of his appointment. (A. 10).

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

A. The Seventh Circuit's Opinion in this Case Is Consistent with Well Settled and Uniform Law of this Court and the Courts of Appeals

This case comes down to the simple, well-established legal proposition expressed by the Seventh Circuit in this case: "Unless unilateral expectations are enough to create a property interest, Upadhya cannot prevail." (A. 9). The Seventh Circuit applied state law to reach its conclusion that Upadhya's claims were only unilateral expectations. The Seventh Circuit's conclusion that Upadhya's unilateral expectations were not enough to create a property interest in continued employment is consistent with prior decisions of the Supreme Court, the Seventh Circuit, and the other federal circuit Courts of Appeals. There is neither confusion concerning, nor any need for clarification of the law applicable to the facts of this case.

This Court cautioned in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972): "[t]o have a property interest in a benefit, a person clearly must have more than an abstract desire or need for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." As noted by the Seventh Circuit herein, a "legitimate claim of entitlement" to continued employment means more than a high probability of renewal of an appointment. *Id.* 408 U.S. at 578 n. 16; *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 463-65 (1981). It means "an expectation . . . that was legally enforceable", *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 788 n. 21 (1980), a mutually binding obligation, *Jago v. Van Curen*, 454 U.S. 14, 18-20 (1981). (A. 6).

The law is also well established that "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . ." *Board of Regents v. Roth, supra*, 408 U.S. at 577. As this Court held in *Roth*, an untenured professor serving on a series of annual appointments without an entitlement to renewal founded on state law (like Upadhya) has no property interest in his position. *Id.* at 576-78. Further, as this Court said in *Perry v. Sindermann*, 408 U.S. 593, 602 n. 7 (1972), and the Seventh Circuit noted herein, concerning a claim to employment based on promises and customs of the employer, "if it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, the respondent's claim would be defeated." (A. 6-7).

The law is equally established, as the Seventh Circuit noted herein, that the Fourteenth Amendment's guarantee of due process does not protect an employee's expectation of continued employment when that expectation is founded upon a mistaken understanding of state law, regardless of how reasonable that understanding is. *Bishop v. Wood*, 426 U.S. 341, 344-47 (1976); *Smith v. Board of Education*, 708 F.2d 258, 264 (7th Cir. 1983). (A. 7).

The Seventh Circuit properly followed this Court's cautions, and applied state law to determine the scope of Upadhya's entitlements. Under state law, the Seventh Circuit concluded Upadhya's claims were only unilateral expectations, not legitimate claims of entitlement.

B. The Seventh Circuit's Decision Does Not Conflict with any Other Circuit Court of Appeals Decision

Contrary to Upadhya's contention, the Seventh Circuit's decision does not conflict with the decision of any other circuit. In the cases cited by Upadhya which address the property rights of state employees,[4] the Courts also turned to the applicable state law to determine whether there was a binding obligation sufficient to create a property interest in continued employment for the particular period of time at issue. The cases necessarily differ as each Court applied the applicable state law to the facts of the case at issue. However, the Courts' legal analyses of whether a property interest existed in those cases are all consistent with the Seventh Circuit's analysis in this case.

At a minimum, the Courts required a definite and certain promise or assurance of continued employment before due process property rights could attach. For example, in *Soni v. Board of Trustees of the University of Tennessee*, 513 F.2d 347 (6th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976), the plaintiff acquired property rights through a series of express assurances to him that his employment was secure and that he would be treated as if he had tenure, even though the University acknowledged it could not formally tenure him under state law because he was an alien. *See also, Harris v. Arizona Board of Regents*, 528 F. Supp. 987, 995-96 (D. Ariz. 1981), (The property interest

[4] Cases cited by Upadhya (Upadhya's Petition for Certiorari at pp. 14-16) involving federal employees, as opposed to state employees, do not create a conflict. They are not controlling. Moreover, none are inconsistent with the relevant principles followed by the Seventh Circuit. The Court in each case looked to federal law and regulations, as opposed to state law and regulations, to determine if a legitimate claim to continued federal employment had been created by the federal agency involved.

found was based on an express written promise of automatic tenure in the third year of employment).

Where there was no promise or guarantee of continued employment, as herein, no property interest was found. For example, in *Lovelace v. Southeastern Massachusetts University*, 793 F.2d 419 (1st Cir. 1986), an untenured faculty member's claims to continued employment were insufficient to create a property interest where they were not based on a definite and certain promise or guarantee. *See also, Wright v. Cayan*, 817 F.2d 999 (2nd Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 157 (1987), (There was no property interest in continued employment where state law required a promise of employment for a specific duration to limit an employer's right to terminate, and there was no such promise).

The Courts also considered whether a promise or understanding would be enforceable under state law. For example, in *Baden v. Koch*, 638 F.2d 486 (2nd Cir. 1980), the Court held that misunderstandings of state law could not alter a New York law permitting the plaintiff's removal without a hearing. *See also, White v. Mississippi State Oil and Gas Board*, 650 F.2d 540 (5th Cir. 1981), (Even an express oral promise granting a right to continued employment was insufficient to create a property interest, because the oral promise would have been unenforceable under the state statute of frauds).

None of the cases cited by Upadhya stand for the proposition that a unilateral expectation of continued employment—not grounded in an express promise or assurance of continued employment, contrary to state law, and contrary to the terms of an express employment contract, as herein—is sufficient to create a property interest in continued employment. The Seventh Circuit's decision

herein is completely consistent with relevant decisions of other circuit Courts of Appeal.

C. The Seventh Circuit's Decision Is Consistent with Other Seventh Circuit Decisions

As the Seventh Circuit specifically noted herein, Upadhya does not come within its earlier holding in *Vail v. Board of Education*, 706 F.2d 1435 (7th Cir. 1983), *aff'd by an equally divided court*, 466 U.S. 377 (1984). (A. 9). Contrary to Upadhya's contention, the question presented in *Vail* for this Court's review—whether an express promise which was void under state law could create an enforceable property interest in continued employment for the period promised—is not presented in this case. Unlike *Vail*, Upadhya did *not* obtain a definite and certain promise that five years would be his minimum term of employment. Also unlike *Vail*, any implication to that effect would have been unauthorized by the President and Board of Trustees of the University—the only persons who could bind the University to such contracts.

Moreover, in the face of the University's formal tenure system fully described in its *Statutes*, any reliance on a promise to that effect would be unreasonable. The Seventh Circuit in *Vail* expressly distinguished Vail's situation from that of untenured professors at the University of Illinois (like Upadhya), concluding that: "The [University of Illinois'] explicit rules governing tenure in *McElearney* suggest that any reliance to be based on a supposed entitlement . . . by virtue of the informal assurances McElearney received would be unreasonable." *Vail, supra*, 706 F.2d at 1439, n.4.

In *Vail*, the Seventh Circuit referred to its earlier rejection of the claims of former untenured assistant pro-

fessor McElearney at this same University that he had a property interest in continued employment beyond the terms of his terminal contract, claims nearly identical to Upadhya's claims herein. In *McElearney v. University of Illinois*, 612 F.2d 285, 290 (7th Cir. 1979), the Seventh Court unequivocally rejected McElearney's claims, holding:

> The Board of Trustees of the defendant university has promulgated certain university statutes pursuant to statutory authority. Ill. Rev. Stat. Ch. 144, Sections 4, 22, 28; *People ex rel. Board of Trustees of the University of Illinois v. Barrett*, 382 Ill. 321, 335, 46 N.E.2d 951 (1943) . . . Section 1b(6) of Article X provides:
>
> > An appointment for a definite term does not carry any guarantee or implication that the Board of Trustees will renew the appointment even though the appointee may have discharged his duties satisfactorily. An appointment for a definite term, if accepted, must be accepted with this stipulation.
>
> As a probationary faculty member, under section 1b(6) of Article X, plaintiff has no property interest in continued employment and no due process protections attach.

Subsequent to *Vail*, the Seventh Circuit again affirmed the dismissal of the similar due process property claim of untenured assistant professor Weinstein to continued employment at the University of Illinois beyond the term of his identical terminal contract, based on Article X, Section 1b(6) of the *Statutes*, and citing *McElearney, supra. Weinstein v. University of Illinois*, 628 F.Supp 862 (N.D. Ill. 1986), *aff'd*, 811 F.2d 1091 (7th Cir. 1987). The Seventh Circuit's decision herein is completely consistent with its earlier decisions addressing identical claims of untenured

assistant professors at the University of Illinois, like Upadhya.

D. The Seventh Circuit Properly Held That Upadhya Had No Legitimate Claim to Continued Employment under State Law

The Seventh Circuit correctly concluded that Upadhya's belief that he would be employed for five years was just a unilateral expectation, not a legitimate claim of entitlement under state law, because it was not backed up by a promise by the University to employ him for five years. Under Illinois law, a definite and certain promise of employment for five years is a prerequisite to a finding of an express five year contract. *Ladesic v. Servomation Corp.*, 140 Ill. App. 3d 489, 491, 488 N.E.2d 1355, 1356 (1st Dist. 1986); *Titchener v. Avery Coonley School*, 39 Ill. App. 3d 871, 350 N.E.2d 502, 507 (2d Dist. 1976). An implied contract must also be based upon a promise inferred from the expressions on the part of the promissor, here the University, which show an intention to be bound. In re *Estate of Milborn*, 122 Ill. App. 3d 688, 461 N.E.2d 1075, 1077 (3rd Dist. 1984); *Titchener, supra*, 350 N.E.2d at 507. A claim of promissory estoppel, as well, requires proof of an unambiguous promise. *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1264 (7th Cir. 1985) (applying Illinois law); *Pudil v. Smart Buy, Inc.*, 607 F. Supp. 440, 444 (N.D. Ill. 1985).

The Seventh Circuit also correctly held that vague statements about how long Upadhya could expect to serve before a final tenure decision was made were insufficient, under state law, to translate probabilities into entitlements. Under Illinois law, statements that a benefit will accrue or an event will occur on a date certain or after

a given period of time do not constitute a guaranty that the employee will be employed through that date or period of time. *Medina v. Spotnail, Inc.*, 591 F. Supp. 190, 197 (N.D. Ill. 1984) (applying Illinois law).

The Seventh Circuit also properly held that, under Illinois law, any implication of a five year employment commitment to Upadhya was unauthorized by the President and Board of Trustees of the University, who are the only persons who could bind the University to such contracts. The University *Statutes* so provide, and they have the force of law in Illinois. *Rend Lake College Fed. of Teachers Local 3708 v. Bd. of Community College Dist. No. 521*, 84 Ill. App. 3d 308, 311, 405 N.E.2d 364, 367-68 (5th Dist. 1980) (collecting cases). The Seventh Circuit further properly concluded that, under Illinois law, those *Statutes* became a part of Upadhya's contract because Upadhya signed a document which expressly incorporated them. *Golen v. Chamberlain Manufacturing Corp.*, 139 Ill. App. 3d 53, 59, 487 N.E.2d 121, 126 (1st Dist. 1985).

The Seventh Circuit accurately concluded that Upadhya had no legitimate claim of entitlement under state law to continued employment by the University.

E. Upadhya Had No Legitimate Claim to Continued Employment under State Law for Additional Reasons the Seventh Circuit Did Not Need to Reach

The Seventh Circuit did not need to reach additional reasons why Upadhya's claim to five years of employment would be unenforceable under state law, since the record did not support a finding that a five year promise was made. However, as accurately noted by the Seventh Circuit, given the parol evidence rule, Upadhya would face hurdles relying on even an express oral promise of employment for five years because he would be using it to

vary the terms of three subsequent writings. Under Illinois law, the existence of an express written contract (Upadhya's appointment) precludes a search for an implied or quasi-contract. *International Administrators, Inc. v. Life Ins. Co. of North America*, 753 F.2d 1373, 1384 (7th Cir. 1985) (applying Illinois law); *Bachewicz v. American National Bank & Trust Co.*, 126 Ill. App. 3d 298, 466 N.E.2d 1096, 1110 (1st Dist. 1984). Further, Upadhya's and Wu's intentions or understandings are irrelevant to a determination of Upadhya's legitimate claims of entitlement because, under Illinois law, the parties' intentions and understandings must be gathered from the writings, without the assistance of parol evidence or any other extrinsic aids. *Rakowski v. Lucente*, 104 Ill. 2d 317, 472 N.E.2d 791, 794 (1984).

As the Seventh Circuit noted, it also did not have to decide whether an express promise of employment for five years by a subordinate official of the state, contrary to the *Statutes*, could have created an enforceable right to continued employment. However, under Illinois law, even if an express five year employment promise had been made to Upadhya contrary to the express provisions of the *Statutes*, it could *not* have created an enforceable obligation. Estoppel cannot be invoked against a public body based on a promise contrary to state law. *Evans v. Benjamin School District No. 25*, 134 Ill. App. 3d 875, 480 N.E.2d 1380, 1386 (2d Dist. 1985); *Anderson v. Bd. of Trustees of Community College Dist. No. 526, County of Sangamon*, 56 Ill. App. 3d 937, 372 N.E.2d 718 (4th Dist. 1978).

Agents of the University could not have made an enforceable promise contrary to the *Statutes*. Illinois law instructs that anyone entering into an agreement with the State takes the risk of accurately ascertaining that he who

acts for the state stays within the bounds of his statutory authority. *Metromedia, Inc. v. Kramer*, 152 Ill. App. 3d 459, 504 N.E.2d 884, 889-90 (1st Dist. 1987). Nor could Upadhya have *reasonably* relied on representations contrary to the express provisions of the *Statutes* even if made. *Levin v. Civil Service Comm'n*, 52 Ill.2d 516, 288 N.E.2d 97, 102 (1972); *Burnidge Bros. Almora Heights, Inc. v. Weise*, 142 Ill. App. 3d 486, 491 N.E.2d 841 (2d Dist. 1986); *see also, Vail v. Bd. of Education, supra*, 706 F.2d at 1439 n.4.

While the Seventh Circuit did not need to reach these additional reasons why Upadhya had no right to continued employment under state law, they are independent grounds which also support the Seventh Circuit's decision.

F. The Seventh Circuit Properly Held that Department Head Wu Lacked Authority to Promise Upadhya Employment for Five Years under the University's Statutes

Contrary to Plaintiff's assertions, the Seventh Circuit properly held that Department Head Wu did not have the authority under the *Statutes* to promise employment to Upadhya for more than two years. (A. 7-13). The *Statutes*, which have the force of law in Illinois, clearly provide that untenured assistant professor appointments may be for no longer than two years and limit exceptions to those expressly approved by the President or Board of Trustees. Contrary to Upadhya's suggestion, the words of the *Statutes* simply are not amenable to any other reading.[5]

[5] Contrary to Upadhya's further assertion without citation (Upadhya's Petition for Certiorari at p. 18), Respondents do not "concede" that Dr. Wu had sole discretion to initiate Upadhya's termination. He did not. Even if he did, this would be irrelevant to the issue—whether Dr. Wu was authorized to make a five year employment promise to Upadhya.

G. The Seventh Circuit Properly Held Certain Factual Findings Were Without Record Support and Were Clearly Erroneous

The Seventh Circuit properly held that, to the extent the district court found that the University promised Upadhya he would have a five year term and would not be dismissed before five years were up, its findings were clearly erroneous, citing *Anderson v. Bessemer City*, 470 U.S. 564 (1985). (A. 8-9). The Seventh Circuit came to this conclusion only after a careful review of the writings between the parties which contradicted such a finding, and a careful review of all of the record testimony cited by Upadhya which did not support such a promise. (A. 3-5, 8-9, 12-13). Contrary to Upadhya's assertion that the Seventh Circuit reversed because it weighed the evidence differently than the district court (Upadhya Brief at p. 19), the Seventh Circuit properly concluded after careful review that there was *no* evidence in the record to support these findings. (A. 8).

H. The Seventh Circuit Properly Refused to Hold that Upadhya Could Acquire a Property Interest through Purported Department Practices

The Seventh Circuit properly refused to hold that Upadhya could acquire a property interest in five years of employment through a purported practice in one department of the University of Illinois, the institution that employed him, which would be contrary to the University's formal tenure system, contrary to state law, and contrary to the terms of his express one year appointments. As the Seventh Circuit noted, this Court in *Perry v. Sindermann, supra*, instructed that the possibility of creating a property interest in continued employment through custom and practice is dependent upon a showing sufficient to create a contractual or other claim to job tenure under state law.

defendant to Chicago; he was entertained; he was given assurances in his interviews; he was attended in his conducting of a demonstration seminar. While in Chicago arrangements were made for him to talk with the head of the department, the head of its Curriculum Committee, with members of the advisory committee, and with other provessors in the department. Professors Wu, McNallen and Danyluck advised and convinced him to pursue the longer term assistant professorship because such position would give him the full five years to establish an impressive portfolio and to enhance his chances for tenure. He was invited by all that happened to him to place his reliance upon the words of these soon to be fellow professors.

Upadhya's belief that he had the opportunity of obtaining a five year contract was then reaffirmed by Professor Wu's telephone offer and subsequent letter of June 30, 1984, confirming Upadhya's appointment. At no time during their phone conversation was he instructed that his term of employment would be governed by a University Statute that would require him to be reappointed each year, or that he could be discontinued at anytime without being given a reason. Moreover, it is reasonable to interpret Wu's letter of July 30, 1984, when read in its entirety, as constituting a binding written agreement upon its being signed and returned to him. This certainly created the foundation for a legitimate implied contract, if not an agreement expressed in fact. This letter of July 30, 1984, contained the terms of Upadhya's salary, the details of his tenure track, his expected duties, and most importantly, the request that he formally respond in writing to the University's "offer" by signing and returning an acceptance copy in order that the school "resolve the other *formalities.*" (Emphasis added.) This complies with the common law requirements of agreement, offer and acceptance and exchange of consideration. As plaintiff notes, the letter of July 30, 1984, was the same letter in which Wu previously had told Upadhya that he would outline in "black and white" all of the terms and conditions of Upadhya's employment.

Further, as plaintiff again notes, the evidence at trial was uncontested that no one actually ever told Upadhya when the Board of Trustee's approval would occur. Actually it did not occur until October 18, 1984. It is also uncontested evidence supported by the testimony of Chancellor Langenberg that Wu, the department head of CEMM, had general authority to write the letter of confirmation and to make the offer.

The court is in agreement with the plaintiff's conclusion that as of July 30, 1984, Upadhya and CEMM conducted themselves as though a binding employment contract had been entered into. There is acquiescence in this fact by the evidence that both Wu and McNallen fully anticipated and expected Upadhya to begin working and engaging in his teaching duties when school opened in September. Moreover, Upadhya prior to arriving on campus in September discussed with McNallen the course he was to be prepared to teach that fall and that he should forward the course outline to McNallen on August 1, 1984. Indeed, it was not until over six weeks after Upadhya began his work as an assistant professor that his appointment reached the desk of and presumably received final approval by the Board of the University. But this was a formality after the fact which did not change the time nor the terms of his appointment.

"A term of employment set by contract has been recognized as a property interest which the state cannot extinguish without conforming to the dictates of procedural due process." *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570 (1972), *Board of Regents v. Roth*, 408 U.S. at 576-577, 92 S.Ct. at 2708-09. The existence of such a contractually established property interest obligates the Board before depriving Upadhya of it, "to grant him a hearing [procedure in which he] can be informed of the reasons for his non-retention and [be able to] challenge their sufficiency." *Hostrop v. Board of Junior College District No. 151, et al.*, 471 F.2d 488, 494 (7th Cir. 1972). Astonishingly, the first time Upadhya was made aware that the University considered his appoint-

ment to entail an employment at will, if not a year to year appointment, was on June 16, 1986, two years after his initial hiring and substantially subsequent to his receipt of the notice of termination.

The fact of the matter is that, according to the evidence, the University had at that time no established policy for dealing with the situation involving the formal hiring of Professor Upadhya. The validity of the University Statutes are not in question. The evidence is that these statutes or regulations were never formally brought to Upadhya's attention at the time he was hired. The record establishes that Upadhya received copies of them *after* he accepted Wu's unconditional written offer and after he had signed and returned it. Consequently, this court concludes in agreement with the court in *Vail*, that Upadhya acted reasonably in relying on assurances and conduct of University officials that he had a tenure track position. This was sufficient "to create a property interest despite state law and university regulations . . ." *Vail* at 1440, quoting *Soni v. Board of Trustees of the University of Tennessee*, 513 F.2d 347 (6th Cir. 1975), *cert. denied*, 426 U.S. 919, 96 S.Ct. 2623, 49 L.Ed.2d 372 (1976). The evidence at trial convinces this court that the formal assurances given by the University adequately gave rise to a legitimate and reasonable expectations of a protectible property interest. *Vail* at 1440. *See also McElearney v. University of Illinois Chicago Circle*, 612 F.2d 285 (7th Cir. 1979) (addressing the question of whether informal assurance can create a property interest). Accordingly, plaintiff acquired through the implied contract entered into with him by the defendants a property right protected under the Due Process Clause and 42 U.S.C. § 1983.

DUE PROCESS

The question is just what does "due process" entail in a situation involving the sudden, intra-semester firing of a state college professor hired on a 4-5 year tenure track (though the formalities of his continuation on that track

are provided for with an annual appointment for the subsequent year and a prerequisite to tenure is handled by a formal performance evaluation done one year prior to the end of the tenure track). It may be that it calls for as much as was required by the Supreme Court for the discontinuation of benefits to a welfare recipient. There the Court stated that the requirement is (1) a *pre-termination evidentiary* hearing (acknowledging that where harm to the general public is so threatened that summary and immediate removal of the presumed cause is mandated by common sense—as with the seizure of food claimed to be unfit for human consumption); (2) a hearing that takes the form of a judicial or quasi-judicial trial, though a complete record and a comprehensive opinion of the decision maker would be out of the question; (3) with notice given sufficiently prior to the hearing to permit the recipient to prepare for it and if necessary to obtain counsel or other advice; (4) the right of confrontation sufficiently fundamental to fairness in answering to charges made; and (5) the hearing to be before an impartial and fair hearing officer or body—i.e., impartial to the extent that he not be himself the accuser. *See generally, Goldberg v. Kelly,* 397 U.S. 254, 263-271, 90 S.Ct. 1011, 1018-22, 25 L.Ed. 2d 287 (1969), and cases cited therein. *See in particular: Willner v. Committee on Character & Fitness,* 373 U.S. 96, 103-104, 83 S.Ct. 1175, 1180, 10 L.Ed.2d 224 (1963). *See also, Parratt v. Taylor,* 451 U.S. 527 at 537-543, 101 S.Ct. 1908 at 1913-17, 68 L.Ed.2d 420. The Supreme Court has been consistent in maintaining that where "deprivations of property [have been] authorized by an established state procedure," due process has required pre-deprivation notice and hearing "in order to serve as a check on the possibility that a wrongful deprivation would occur . . ." The fundamental requirement of due process is the opportunity to be heard and it is an "opportunity which must be granted at a meaningful time and a meaningful manner." [Citing *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)]. *Parratt* at 543, 101 S.Ct. at 1917.

[6] Here we are presented with a person (whether or not he is a citizen—so the Fourteenth Amendment speaks), a public employee of the University of the State of Illinois who before being fired, was never actually presented with a bill of charges against him nor given any meaningful opportunity to be heard on those charges before he was summarily terminated from his teaching position. Here the governmental interest in expediated discharge simply does not come into play, nor is there any reason in the evidence before me that would cause expedition to outweigh the severity of injury to his career or his position. *See Board of Education v. Loudermill*, 470 U.S. 532, 543, 105 S.Ct. 1487, 1494, 84 L.Ed.2d 494 (1985).

Upadhya was actually voted out in a meeting between Professor Wu and his advisory committee on May 14, 1986. He was first notified that he would be receiving a terminable one year contract on June 2, 1986, 19 days later. On June 15, 1986, 33 days after the fact, Wu wrote a memorandum to Upadhya informing him that he was being discharged for "insufficient teaching." And even though by then he had informally heard some things about the matter, the memorandum itself contained no explanation of the charge nor anything that could put him on notice as to why the University was firing him. It is true that in the course of this trial the University's witnesses testified to several incidents which they said led to their decision to discharge Upadhya, but the totality of the evidence supports the impression the court, as trier of fact, got, that the evidence never disclosed the true reason. I think that it safely can be said that before state employees on a professional level, who are expected to bring something to their jobs with them that in the first instance required of them specialized preparation at an outlay greater than that otherwise provided by the state to all of its people are "cut-loose" or told to "get out," they are entitled to notice of the charges against them, and to a meaningful opportunity to be heard on those charges by someone other than their accusers, before they can be discharged. *See Cleveland Board of Education v. Louder-*

mill, supra; *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1265 (7th Cir. 1985). These requirements are fundamental and cannot be compromised, especially by a state governmental body that has by the words and purpose of the Fourteenth Amendment been admonished to maintain the highest standards of fairness, honesty, and propriety in dealing with all "people." And even as the Court in *Loudermill* noted, "the [governmental] employer shares the employee's interest in avoiding disruption and erroneous decisions . . ." *Loudermill*, at 544, 105 S.Ct. at 1495.

Legislatively the State of Illinois has made a strong commitment to the concept of an inherent property interest of teachers in their positions as employees of the State's own educational institutions. Its statutes expressly provide a detailed procedure for pre-termination notice and opportunity to be heard to all of its teachers working under the State Board of Education. *See Employment of Teachers*, Chap. 122, 24-12, Illinois Revised States, 1985. As to the State's colleges and universities, the duty to establish "procedures not inconsistent with the law" to provide for the "good government and management of its colleges and universities," has been delegated to the board of governors of the institutions of higher education. *See Board of Education*, Chap. 144, § 1008, Illinois Revised Statutes, 1985. The Supreme Court of Illinois this year in *Duldulao v. St. Mary of Nazareth Hosp.*, 115 Ill. 2d 482, 106 Ill. Dec. 8, 12, 505 N.E.2d 314, 318 (1987) indirectly addressed the basic problem here when addressing the matter of institutional regulations and handbooks language preserving the traditional power to hire and fire "probationary employees" at will, held that an "employment at will" regulation is merely a "rule of construction" mandating only a presumption that a hiring without a fixed term permits at will firing without notice or without cause—a presumption which can be overcome by a demonstration that the parties agreed otherwise. The implication of this decision is that property interests in continued employment can grow out of the understandings

and practices of the parties nevertheless, and permit the institutional employee some degree of pre-termination due process. For, as stated by the Seventh Circuit in the case of *Reed v. Village of Shorewood*, 704 F.2d 943 (1983) at 948: "So we must look behind labels . . . and decide whether [it] was 'property' in a functional sense. Since, viewed functionally, property [for purposes of due process under the Fourteenth Amendment] is what is securely and durably yours under state (or as in *Goldberg* [*Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287] federal law) as distinct from what you hold subject to so many conditions as to make your interest meager, transitory or uncertain."

It is not the duty of the court to determine the validity of the University's charges, nor to conclude whether or not Upadhya was in fact a "good teacher." That is not the question. (Even if it were it could not have been answered on the basis of the evidence presented.)

The question is: has Upadhya received due process? The answer is: He has not. The trial record shows that no notice was given prior to the June 16, 1986, memorandum. The evidence shows that Upadhya did not know until the discovery process in this case the full list of charges against him. (Early in discovery he proceeded as though the charge involved was a suggestion that improperly he had had an affair with a woman. Discovery protections were provided. Depositions were taken. Nothing came out in the trial about this idea.) The interview afforded him at his request by the dean of CEMM was not a hearing as such and their discussion did not involve all of the charges which at that date had been made against him. The so-called "grievance procedure" given after receipt of a formal notice of termination was inadequate, and the collateral advice of the grievance hearing officer was ignored by the defendant. And no appeal was heard by the Chancellor.

The following recitation of facts taken from plaintiff's proposed findings of fact and conclusions of law are a rela-

tively accurate statement of the evidence in this case on the question of a hearing as the same is required by procedural due process.

Under the University's structure, the decision to institute non-retention proceedings is left to the discretion of the department head.

On May 14, 1986, Wu called a meeting of the CEMM Advisory Committee which met and voted unanimously to terminate Upadhya's employment. McNallen, Danyluk, R.H. Bryant, Thomas Ting, and Ernesto Inadcochea, were the elected members of the committee; they all met with Wu.

Upadhya was not told that the Advisory Committee would be meeting on May 14, 1986 to consider Wu's decision to fire him.

Upadhya was not invited to and did not attend the Advisory Committee meeting on May 14, 1986.

On May 22, 1986, Wu wrote a document called Recommendation for Non-Retention; it contains the actual charges against Upadhya and the reasons he was being fired. Upadhya was never given or told about this Recommendation for Non-Retention.

Dean Chung and the then Vice-Chancellor of Academic Affairs, Richard Johnson approved the Recommendation for Non-Retention prior to May 28, 1986.

Johnson wrote a letter (dated May 28, 1986) to Upadhya advising him that he would be issued a terminal contract for the 1986-87 academic year, meaning that he was fired on May 28, 1986, effective August 31, 1987.

Wu did not tell Upadhya the charges contained in the Recommendation for Non-Retention. The charge of insufficient teaching was the only official reason ever communicated to Upadhya for his firing in Wu's memorandum of June 16, 1986.

Wu wanted the Recommendation for Non-Retention to appear as severe as possible.

In June, 1986, Danyluk and Bryant gave Wu memoranda they claim records what they had said at the May 14 meeting, and Indacochea gave Wu a memorandum in which he recites events which Indacochea claims took place on June 4, 1986. Upadhya was not given, shown or told about any of these memoranda.

Upadhya met with Chung informally in June 1986; Chung did not tell Upadhya about the Recommendation for Non-Retention or any of the charges contained in it. Chung did tell him teaching was not the real reason he was fired.

In September, 1986, Upadhya appealed the firing to Chancellor Langenberg, asking him for a hearing *de novo.*

While the appeal was pending before Chancellor Langenberg, on September 24, 1986, Dean Chung sent Langenberg a thick package, including a memoranda from the other faculty, and other documents. (Def. Ex. 113) In the memorandum Chung made additional charges against Upadhya.

Neither Chung's memorandum, nor any of the attachments added to it, was ever given to Upadhya, nor was he told about it.

Upadhya was not able to and never did respond to Chung's charges while Langenberg was considering Upadhya's appeal.

Chancellor Langenberg did not hold any hearing and on October 6, 1986, Langenberg denied Upadhya's appeal.

CONCLUSION

In conclusion, I find that Upadhya has been injured in that he has been denied the right of due process of law to which under the Constitution of the United States he is entitled. I find that if he is terminated on August 31, 1987, Upadhya will have been irreparably harmed because

he will have lost the benefits of his two year effort invested in continuing research and in support of his teaching directed toward achieving tenure. He will lose the continued use of the $120,000 laboratory he built at the University and the benefits it would serve in his own professional growth. He will also lose his reputation and standing in his academic and professional community, particularly in view of the entry that will have to be made on his resume when accounting for the years 1984-1987. His inability to find another job since being notified of his termination in May of 1986 will continue. I further find that the University will suffer no significant cost in time or money if it is required to back-up and provide Upadhya with the full of the due process to which he is entitled.

Wherefore, it is ordered as follows:

1. Judgment is entered for the plaintiff and against the defendant.

2. The defendant is ordered to continue the plaintiff in his present position in its employ until it shall have given him a complete and constitutionally sufficient application of due process of law as hereinabove set forth.

3. This cause is set down to September 14, 1987 at 2:00 p.m. for hearing as to any further orders of judgment or relief.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KAMLESHWAR UPADHYA,

Plaintiff,

No. 87 C 0086 vs.

DONALD N. LANGENBERG, et al.,

Defendants.

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

As an addendum to its Memorandum of Opinion and Order entered herein on August 31, 1987, the Court ADOPTS, except for certain minor changes, deletions and modifications, Plaintiff's Proposed Findings of Fact and Conclusion of Law as its own, and with said changes sets out below and directs that the same be filed herein and attached to said Memorandum of Opinion and Order, as the Court's

Findings of Fact

1. In March 1984 Kamleshwar Upadhya, who holds Ph.D. in Metallurgy was a research associate which is a non-teaching position at the University of Minnesota in Minneapolis.

2. At that time, Upadhya was seeking a tenure track teaching position at the University so that he could teach and have the opportunity to do long term research in his area of specialization in Metallurgy.

3. Upadhya had never before held a teaching position at an American college or university.

4. In March 1984 Upadhya saw an advertisement in the Journal of Metals, a scholarly and professional journal for Metallurgists, announcing an opening in the Department of Civil Engineering, Mechanics and Metallurgy ("CEMM") at the University of Illinois at Chicago. The ad stated *inter alia*:

> [CEMM] is seeking applicants for a tenure track position at the assistant/associate full professor level in the general area of metalurgy and materials. An initial appointment at associate professor level will be for a period of four years and an appointment at the full professor level will be tenured. . . . Preference will also be given to candidates with strong research records. Duties include teaching at the graduate and undergraduate levels and developing funded research projects. Salary and rank will depend upon qualification.

5. The ad was written and placed by Chien Wu, who is the Department Head and by Michael McNallan, an associate professor with tenure in CEMM.

6. Upadhya knew McNallan from participation in professional meetings.

7. Upadhya saw the ad in March 1984 and telephoned McNallan to inquire about applying for the advertised position.

8. McNallan was the CEMM faculty member most closely involved with Wu in the selection of the new faculty member.

9. McNallan arranged for Upadhya to come to the University to be interviewed on June 12, 1984.

10. Upadhya arrived in Chicago on June 11, 1984; that evening McNallan, Stephen Danyluk, a tenured professor in CEMM and Ernesto Indacochea, an untenured assistant professor in CEMM took Upadhya to dinner.

11. On June 12, he interviewed with several CEMM faculty members and gave a seminar.

12. Prof. Irving Miller, Dean of the Graduate College, who interviewed Upadhya first on June 12, told him that, based on his substantial prior record, Upadhya was qualified to join the faculty at the high rank of associate professor as well as at the lower rank of assistant professor.

13. Upadhya expressed his interest in obtaining tenure and questioned how long it would take for him to do so and asked them to explain the difference between being hired as an assistant and as an associate professor. Upadhya also asked their advice as to which position would be better for him if offered a position in CEMM.

14. The associate professor position would have been at a salary of $37,000-39,000 and the assistant professor would have been at a salary of $34,000 plus.

15. McNallan and Danyluk told Upadhya that entering as an associate professor meant that he would have two years in which to build a record before being reviewed for tenure while entering as an assistant professor would provide five years.

16. McNallan and Danyluk advised Upadhya that it would be in his best interest to join the faculty as an assistant professor because a longer tenure track would provide him with a better chance to obtain tenure.

17. One of the reasons Danyluk and McNallan each advised Upadhya to pursue the lower rank is because, as an experimentalist, it would take Upadhya more time to build a record to justify a favorable tenure decision.

18. Dr. Wu told Upadhya that he could enter CEMM as an assistant professor with 0, 1, or 2 years credit on the tenure track.

19. Upadhya explained to Wu that he is an experimentalist and would need time and money to build a laboratory.

20. Based on the demeanor of Wu and Upadhya at trial, the reasonableness of their testimony, and the testimony of others, the Court credits the testimony of Upadhya and

finds that Wu did not materially differ with Upadhya on most material fact. The evidence is that Upadhya was offered and accepted a tenure tract position at tenure code 2 which meant that he could expect employment for five years, following which, if he then were retained he could be given tenure.

21. Upadhya relying on the advice of McNallan, Danyluk and Wu decided on the lesser ranked assistant professorship with its five year tenure track and a lower salary rather than the rank of associate professor with a higher salary, and a shorter term tenure tract.

22. In a telephone conversation with Professor McNallan in June 1984, Upadhya asked McNallan if CEMM would be offering him the position because he, Upadhya, was considering other job offers which he had received at that time.

23. In July, 1984 Wu called Upadhya in Minnesota to firm up the offer to him of the position of assistant professor at the salary of $35,000.

24. Wu asked Upadhya over the telephone to accept the offer and stated that he would not put all the terms in black and white until after an AA-2 form (an Equal Opportunity form) had been internally approved.

25. Upadhya accepted Wu's offer by telephone in July, 1984.

26. On July 17, 1984 Wu wrote Paul Chung, Wu's immediate superior and Dean of the College of Engineering, recommending Upadhya for the job.

27. On July 17, 1984, Chung approved Wu's recommendation to hire Upadhya as an Assistant Professor with an initial annual salary of $35,000.

28. On July 30, 1984, Upadhya traveled from his then home in Minneapolis to Chicago to obtain the written job offer from Wu.

29. The July 30, 1984 letter (Def. Exs. 32a and 33) is the letter in which Wu had earlier told Upadhya he would

put down in black and white all of the terms and conditions of Upadhya's employment.

30. The July 30, 1984 letter states that Upadhya's position would be given a "tenure code of A2," meaning he would have a five year tenure track.

31. The July 30, 1984 letter states that because Upadhya's tenure code is A2, a "recommendation for promotion or termination must be submitted by [CEMM] no later than the beginning of [Upadhya's] fifth year of service on campus."

32. Upadhya understood the letter to be consistent with his prior discussions with Wu, McNallan and Danyluk to the effect that, if he accepted a position as an assistant professor, he would have a five year period of employment on the tenure track.

33. Upadhya accepted this position relying on the advice he had received from Wu, McNallan and Danyluk.

34. Based on the demeanor of Upadhya and Wu at trial, and the reasonableness of their testimony on this matter, and taking into account all the surrounding circumstances including Wu's awareness that the actual practice within CEMM for many years prior to July 30, 1984 was that all tenure professors served out their track years before being reviewed for promotion and tenure and then were either granted tenure or terminated, the Court finds that the intention of both Upadhya and Wu at the time of the offer and acceptance of the July 30, 1984 letter was that Upadhya had a right to expect to, and would be expected to serve out a five year tenure track term and that before its fifth year the University would review Upadhya for promotion and tenure.

35. On July 30, 1984, the parties did *not* intend that Upadhya would be merely employed for only one year at a time.

36. Any condition that the offer of employment to Upadhya was subject to negotiation and approval subsequently by the Board of Trustees of the University, was

not explained to Upadhya as of July 30, 1984, and was by the defendant considered more a matter of form than of substance.

37. The July 30, 1984 letter to Upadhya contained the principle terms of Upadhya's employment with the University; it served to confirm the prior conversations between Wu and Upadhya and the conversations between Upadhya and Danyluk and McNallan.

38. At the University, Department Heads such as and including Wu, have authority to make offers of employment to prospective faculty.

39. Wu expected that as of July 30, 1984 Upadhya would be approved by the Board of Trustees. In fact, none of the applicants Wu has recommended has ever been turned down by the Board of Trustees.

40. Approval of Upadhya's appointment by the Board of Trustees was a mere formality once Upadhya accepted the offer of employment from Wu on July 30, 1984.

41. The July 30, 1984 letter makes it clear that the criterion for Upadhya to successfully complete his five year tenure track period is to obtain outside research grants.

42. In actual practice within CEMM, the amount of research grant funds obtained by new faculty had been the dominant factor for success in CEMM in achieving promotion and/or tenure for the last 10 years.

43. As of July 30, 1984 Upadhya and CEMM acted as though they had entered into a binding employment arrangement.

44. Wu and McNallan as of July 30, 1984 expected Upadhya to show up for work September 1, 1984.

45. On July 30, 1984, Upadhya met with McNallan, Chairman of the CEMM Curriculum Committee to discuss the new course he would be teaching in September, 1984 and on August 1, 1984, Upadhya sent McNallan a course outline of this new course.

46. At the time Upadhya signed the July 30, 1984 letter, he had job offers from the University of Melbourne in Australia and Massachusetts Institute of Technology and a pending application at the University of Utah.

47. After signing the July 30, 1984 letter, in reliance on the letter, and his understanding that he had a five year term of employment on the tenure track, Upadhya turned down these job offers and withdrew his application at Utah.

48. In further reliance on the July 30, 1984 letter, Upadhya quit his job at the University of Minnesota; he gave up his apartment there; sold his furniture at a loss; moved his belongings to Chicago and staying with a friend and in a hotel for a period of days, rented an apartment and bought new furniture. In addition, Upadhya's wife, who had been a student at Georgia Institute of Technology, moved to Chicago to join him.

49. To accomplish his move to Chicago to commence his job in CEMM, Upadhya expended substantially more than the $676.45 the University reimbursed him.

50. On September 7, 1984 Upadhya received in the inter-campus mail, a pre-printed form called a Notification of Appointment which contained a hand-written red arrow directing Upadhya's attention to typewritten language at the bottom in letters larger and darker than those on the printed form.

The typewritten words state, *inter alia*:

> Please indicate your action (acceptance or declination of this appointment) . . . . Delay in returning the acceptance may result in delay in payment of salary.

51. Upadhya reasonably believed that the Notice of Appointment was nothing more than part of the necessary paperwork required to get his name on the payroll so he signed it in the indicated place and sent it back immediately so that there would be no delay in his receiving his paycheck.

52. Upadhya had no reason to interpret the form differently from what he had already agreed to and understood in the July 30, 1984 letter.

53. The Notice of Appointment showed that Upadhya was to be tenure code "2" which was the same symbol he had read in the July 30, 1984 letter.

54. Upadhya understood that tenure code "2" meant he would have five years on the tenure track.

55. On September 7, 1984 when Upadhya received this form, the Board of Trustees had not yet formally approved his hiring; it did so on October 18, 1984.

56. Upadhya did not receive the document called "Certain Terms and Conditions of Employment" on September 7, 1984.

57. No defendant prior to June 16, 1986, gave Upadhya a copy of the "Certain Terms" or the Statutes or drew his attention to them or told him that they would be a part of his employment contract.

58. Every University faculty member, tenured or untenured, receives a Notice of Appointment each year advising him that his appointment has been renewed for the academic year and at what salary.

59. Upadhya was never told that his appointment was on a year-to-year basis and that he could be terminated for no reason, at any time, until Wu sent him a memorandum on June 16, 1986.

60. From September 1984 through May 1986, Upadhya wrote six scholarly articles; four of which have been published in professional journals and two of which were submitted for publication.

61. From September 1984 through May 1986, Upadhya developed a laboratory at the University for conducting his research; the value of the equipment in the laboratory is at least $120,000.00.

62. The laboratory equipment was purchased by and/or for Upadhya with funds from the University and from out-

side funding sources solicited by Upadhya. He solicited and obtained from a local steel company, a donation to the University of a high temperature furnace worth $40,000 to $50,000.

63. From September 1984 through May 1986, Upadhya obtained $71,000.00 in research grants to fund his research.

64. The laboratory developed by Upadhya belongs to the University and will not be available to him if he is not working for the University.

65. Since 1986 Upadhya has sought other employment in academia and industry. He has not received any job offers.

66. Since 1965, other than Upadhya, no untenured professor on the tenure track who has joined the faculty of CEMM has been involuntarily terminated prior to the end of that professor's tenure track.

67. Untenured professors in CEMM had not been reviewed annually, but they have been reviewed for purposes of tenure and/or retention at the end of their tenure track.

68. On May 6, 1986, Wu had made a decision that Upadhya should resign and that, if he did not, Wu would institute non-retention proceedings to have him terminated.

69. Under the University's structure, the decision to institute non-retention proceedings is left to the discretion of the department head.

70. On May 14, 1986, Wu called a meeting of the CEMM Advisory Committee which met and voted unanimously to terminate Upadhya's employment. McNallan, Danyluk, R. H. Bryant, Thomas Ting, and Ernesto Indacochea, were the elected members of the committee; they all met with Wu.

71. Upadhya was not told that the Advisory Committee would be meeting on May 14, 1986 to consider Wu's decision to fire him.

72. Upadhya was not invited to and did not attend the Advisory Committee meeting on May 14, 1986.

73. On May 22, 1986, Wu wrote a document called Recommendation for Non-Retention (Def. Ex. 75); it contains the actual charges against Upadhya and the reasons he was being fired. Upadhya was never given or told about this Recommendation for Non-Retention.

74. Dean Chung and the then Vice-Chancellor of Academic Affairs, Richard Johnson approved the Recommendation for Non-Retention prior to May 28, 1986.

75. Johnson wrote a letter (dated May 28, 1984) to Upadhya advising him that he would be issued a terminal contract for the 1986-87 academic year, meaning that he was fired on May 28, 1986, effective August 31, 1987.

76. Wu did not tell Upadhya the charges contained in the Recommendation for Non-Retention. The charge of insufficient teaching was the only official reason ever communicated to Upadhya for his firing in Wu's memorandum of June 16, 1986.

77. Wu wanted the Recommendation for Non-Retention to appear as severe as possible.

78. In June, 1986, Danyluk and Bryant gave Wu memoranda they claim records what they had said at the May 14 meeting, and Indacochea gave Wu a memorandum in which he recites events which Indacochea claims took place on June 4, 1986. Upadhya was not given, shown or told about any of these memoranda.

79. Upadhya met with Chung informally in June 1986; Chung did not tell Upadhya about the Recommendation for Non-Retention or any of the charges contained in it. Chung did tell him teaching was not the real reason he was fired.

80. In September, 1986, Upadhya appealed the firing to Chancellor Langenberg, asking for a hearing *de novo*.

81. While the appeal was pending before Chancellor Langenberg, on September 24, 1986, Dean Chung sent

Langenberg a thick package, including a memoranda from the other faculty members, and other documents (Def. Ex. 113). In the memorandum Chung made additional charges against Upadhya.

82. Neither Chung's memorandum (Def. Ex. 113), nor any of its attachments, was given to Upadhya, nor was he told about it.

83. Upadhya was not able to and he never did respond to Chung's charges while Langenberg was considering Upadhya's appeal.

84. Chancellor Langenberg did not hold any hearing; on October 6, 1986, Langenberg denied Upadhya's appeal.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of all the parties and the subject matter of this action.

2. At all relevant times, each of the named defendants was acting pursuant to and under color of state law and each individual defendant was acting in his duly appointed official capacity under the authority of the state. The acts of all of the defendants were deliberately and knowingly performed.

3. The July 30, 1984 letter from Wu to Upadhya was an offer for a contract of employment on a five year tenure track.

4. Upadhya accepted the offer.

5. Wu had authority to make the offer to Upadhya.

6. The July 30, 1984 letter when accepted by Upadhya together with the statements of the parties and their acts and conduct and other statements with regard to the employment of Upadhya constituted a written and implied contract of employment on a five year tenure track not to be discontinued during said five years except for good and reasonable cause and then only in accordance with law requiring pre-termination notice and opportunity to be heard.

6a. The acts and conduct of the parties during the initial interviews of Upadhya, the negotiations for the job offer and the presenting of the written offer on July 30, 1984 and Upadhya's acceptance of it created an implied contract of employment on a five year tenure track, as stated above.

7. Upadhya legitimately and reasonably relied on the acts, conduct and representations of the defendants as well as on the written part of their contract.

8. CEMM has an "institutional common law" custom and practice of allowing new faculty members the full of their tenure track period with the full of a tenure review before deciding whether to give them tenure or terminate their employment.

9. Under *Perry v. Sindermann*, 408 U.S. 593 (1972) and *Vail v. Board of Education*, 706 F.2d 1435 (7th Cir. 1983), Upadhya had a protectable property interest in his continued employment, which could be taken from him for good cause, but then only after formal notice and adequate opportunity to be heard.

10. Defendants failed to give Upadhya formal notice of the charges lodged against him or adequate opportunity to be heard on those charges prior to his termination. The same thing is true with relation to the Recommendation for Non-Retention, and Dean Chung's memorandum to Chancellor Langenberg recommending denial of Upadhya's grievance.

11. Defendants did not give Upadhya due process of law as required by the Fourteenth Amendment in their act of denying him a property interest in employment by the State of Illinois.

12. Upadhya can not be made measurably whole with money damages at law.

13. If Upadhya is terminated as ordered by the University, he will have been irreparably harmed in that he will have been deprived of a constitutional right to due process of law.

14. If he is terminated on August 31, 1987, Upadhya further will be irreparably harmed because, without his position in CEMM he will lose the benefits of the two years of effort invested in his continuing research and grant support and in his teaching in order to achieve tenure. He will lose the use of the $120,000 laboratory he built at the University since 1984. He will also suffer loss of reputation and standing in the academic and professional engineering/scientific community.

15. The University will not suffer any significant injury or expenses of time or money if ordered to provide Upadhya with due process before terminating him.

ENTER:

/s/ JAMES B. PARSONS
James B. Parsons
Senior Judge

Dated: September 11, 1987